UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
FEB 13 2017
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ________ DEPUTY CLERK

OMAR ROSALES Plaintiff,	§	
v.	§	CIVIL ACTION NO. 5:16-CV-1070
CONCENTRA OPERATING CORP., Defendant.	§	

ORDER

Before the Court is Defendant's Motion to Dismiss (docket no. 5), Plaintiff's response and supplemental filing (docket nos. 6, 8), and Defendant's reply (docket no. 9).

I. Background

Plaintiff filed this action on October 27, 2016 alleging Defendant's website violates Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, 12181 *et seq.* ("ADA").[1] Plaintiff is an attorney and is representing himself in this matter. Plaintiff alleges he has a physical disability and mobility impairments. Plaintiff alleges Defendant has denied him and others similarly situated from "navigating and utilizing the information on Defendant's website about the goods, services, facilities, privileges, advantages, and accommodations at Defendant's business." Docket no. 1 p. 2. Defendant argues Plaintiff has not pled facts to show Plaintiff's

[1] In his response to Defendant's motion, Plaintiff also argues he seeks relief under the ADA "attendant regulations, the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), the Texas Accessibility Standards ("TAS"), promulgated under the Texas Architectural Barriers Act ("TABA"), Tex.Gov't. Code §469, and Chapter 121 of the Texas Human Resources Code, Tex.Hum.Res. Code §121.001 *et seq.* ("Chapter 121")" but has not filed an amended complaint. Docket no. 6 at 6.

alleged disability affected his ability to use the site or caused Plaintiff any harm, injury or damage. Docket no. 5 p.1. Defendant, thus, alleges Plaintiff lacks standing to bring this suit.

Defendant also points out to the Court that Plaintiff in representation of a client filed over four hundred ADA actions in the Austin Division of this Court, and alleges this suit is merely an extension of the "nuisance litigation" Plaintiff initiated in the Austin division. Some of these cases were consolidated and dismissed because the plaintiff in that lawsuit had no prior contact with the businesses and any contact was motivated by the filing of the aforementioned suits. Docket no. 5 p. 3. Defendant argues that similarly to the actions Plaintiff filed for his client in Austin, here Plaintiff has had no contact with Defendants' business.

Defendant further argues Plaintiff lacks standing because: (1) He does not claim to be a patient of Defendant's medical practice, (2) Plaintiff resides in Austin not in San Antonio, (3) Plaintiff does not claim to have sought or intends to seek medical services from Defendant. Docket no. 5 p. 2. Defendant contends Plaintiff lacks standing to bring suit because he has not demonstrated a particularized injury. Defendant argues that the Court should dismiss the case for lack of subject matter jurisdiction. Docket no. 5 at 3. Plaintiff does not directly address Defendant's standing argument but rather argues the merits of his case. Plaintiff alleges that Defendant receives Federal funding, thus, Defendant must comply with all Federal rules and regulations. Docket no. 5 p. 5. The second argument Plaintiff advances is that Defendant does not deny its non-compliance. Docket no. 6 p. 6. Further, Plaintiff's response primarily focuses on Defendant's 12 (b)(6) argument, however Defendant has moved to dismiss only on 12 (b)(1) grounds. Plaintiff seeks declaratory and injunctive relief, attorney's fees, costs, and litigation expenses. *Id.* Central to Plaintiff's claims is whether a website, such as the one in question, is considered a "place of public accommodation". This appears to be a matter of first impression in this Circuit. The Court however need not reach this issue in order to determine whether Plaintiff has standing to bring suit.

II. Standard of Review

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal of an action for lack of subject matter jurisdiction. Federal district courts are courts of limited jurisdiction, and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court properly dismisses a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Assn. of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied*, 536 U.S. 960 (2002). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* A Rule 12(b)(1) motion may be made in two ways: a "facial" attack or a "factual" attack. *Elixir Shipping, Ltd. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 267 F.Supp.2d 659, 661 (S.D. Tex. 2003). A facial attack, which consists of a rule 12(b)(1) motion not accompanied by supporting evidence, challenges a court's jurisdiction based solely on the pleadings. *Id.* (citing *Paterson v. Weinberger,* 644 F.2d 521, 523 (5th Cir. 1981)). When accompanied with supporting evidence, a rule 12(b)(1) motion challenging a court's jurisdiction is a factual attack. *Id.* (citing *Paterson,* 644 F.2d at 523).*Velazquez v. Broesche, No.* SA 06 CA 144 FB, 2006 WL 2329401, at *1 (W.D. Tex. June 13, 2006). When a Rule 12(b)(1) motion is filed, the Court considers the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

III. Applicable Law and Analysis

a. The ADA

Title III of the ADA provides, "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods and services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Gilkerson v. Chasewood Bank*, 1 F. Supp. 3d 570, 572 (S.D. Tex. 2014); 42 U.S.C. § 12182(a). Discrimination in violation of the Act includes "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii). The House Report on the ADA stated, "The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities; and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities." H. Rep. No. 101–485, pt. 2, at 22–23 (1990), 1990 U.S.C.C.A.N. 303, 304. 42 U.S.C. § 12188(a)(1) provides injunctive relief. At issue is whether Plaintiff has standing to bring the instant suit.

"Any person who is being subjected to discrimination based on disability in violation of" Title III has a cause of action, but whether a plaintiff has a cause of action is a distinct issue from whether he has standing under Article III. *See Davis v. Passman,* 442 U.S. 228, 239 n. 18, 99

S.Ct. 2264 (1979) (noting the difference between having a cause of action and standing). Thus, because a federal plaintiff must demonstrate standing for each type of relief sought, and the relief available to a Title III ADA plaintiff is injunctive relief, a plaintiff must satisfy the Article III standing requirements for injunctive relief. The Supreme Court has never addressed Article III standing requirements for Title III suits. Many federal courts deciding standing issues under the ADA Title III rely primarily on *City of Los Angeles v. Lyons,* 461 U.S. 95, 111, 103 S. Ct. 1660 (1983) and *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S. Ct. 2130 (1992), which involved very different factual scenarios." *Betancourt v. Ingram Park Mall, L.P.*, 735 F. Supp. 2d 587, 596 (W.D. Tex. 2010).

b. Standing

In order to demonstrate standing, a plaintiff first must demonstrate he suffered "injury in fact, "which means invasion of a legally protected interest that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan,* 504 U.S. at 560. Second, standing requires a causal connection between the conduct complained of and the injury plaintiff suffered. *Id.* Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal citations and quotation marks omitted). The party invoking federal jurisdiction bears the burden of proof for establishing these elements. *Id.* General factual allegations at the pleading stage may suffice since on a motion to dismiss courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Kramer v. Lakehills S., LP*, No. A-13-CA-591 LY, 2014 WL 51153, at *2 (W.D. Tex. Jan. 7, 2014); (citing *Id.* (internal citations and quotation marks omitted)).

i. Concrete and Particularized Injury

Under the first element of the standing doctrine and central to Defendant's motion is whether Plaintiff has demonstrated in a "concrete and particularized" manner that he suffered an injury in fact. A particularized injury is one that affects the Plaintiff in an individual and personal way. *Ass'n For Disabled Americans, Inc. v. 7-Eleven, Inc.*, No. CIV. 3:01-CV-0230-H, 2002 WL 546478, at *2 (N.D. Tex. Apr. 10, 2002) (citing *Lujan,* 504 U.S. at 560 n. 1; *Pub. Citizen, Inc. v. Bomer*, 274 F.3d 212, 218 (5th Cir. 2001)). Defendant argues Plaintiff has not suffered a concrete injury because Plaintiff's alleged disabilities are not related to being able to access Defendant's website. Docket no. 5 p. 4.

Defendant further argues Plaintiff has failed to explain "how the alleged deficiencies in the site combined with Plaintiff's claimed mobility and hand impairment prevented or limited his ability to use the website or gain access to Defendant's medical services." *Id.* Plaintiff has not addressed this issue but upon the Court's review of Plaintiff's complaint it finds that Plaintiff has not demonstrated if and how his disabilities prevented him from using Defendant's website. Courts have limited plaintiffs' standing under the ADA to those architectural or other barriers related to the plaintiffs' specific disabilities. *Betancourt v. Ingram Park Mall, L.P.*, 735 F. Supp. 2d 587, 606 (W.D. Tex. 2010). Plaintiff is limited to pursuing injunctive relief to remedy architectural barriers that discriminate against him and similarly situated individuals based on his disability because Plaintiff has not suffered and will not suffer future injury with regard to ADA violations unrelated to his disability. *Id.* Based on Plaintiff's complaint it is unclear that any issues he encountered with Defendant's website are related to "Plaintiff's specific disabilities". *Id.* A plaintiff must set out facts sufficient to explain in some detail how the alleged deficiencies "negatively affect their day-to-day lives," and mere allegations of non-compliant facilities are insufficient. Thus, while *Frame* stands for the principle that a disabled plaintiff need not traverse a rocky road to prove that a missing sidewalk renders it inaccessible, he must nonetheless show that the inaccessible feature "actually affects his activities in some concrete way." *Frame v. City of Arlington*, 657 F.3d 215, 221 (5th Cir. 2011); *Deutsch v. Yu*, No. A-16-CV-72 RP, 2016 WL 5317370, at *4 (W.D. Tex. Sept. 21, 2016). Based on the record Plaintiff has failed to establish a concrete injury. However, in an abundance of caution, the Court will analyze the remaining elements required to establish standing.

ii. *Actual or Imminent Injury*

Where a plaintiff seeks declaratory and injunctive relief, as in this case, the plaintiff must also show a significant possibility of future harm; it is insufficient to demonstrate only past injury. *Deutsch v. Yu*, No. A-16-CV-72 RP, 2016 WL 5317370, at *2 (W.D. Tex. Sept. 21, 2016) (citing *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669 (1974)). In order to determine whether actual or imminent harm exists a number of courts, including district courts in the Fifth Circuit, have applied a four-factor proximity test to determine if a plaintiff has intent to return to a noncompliant public accommodation: (1) the proximity of plaintiff's residence to the public accommodation; (2) the plaintiff's past patronage of the public accommodation; (3) the definitiveness of the plaintiff's plan to return; and (4) the frequency of plaintiff's nearby travel. *Gilkerson* 1 F. Supp. 3d at 594 (referring to *Access 4 All,* 2005 WL 2989307, at *3; *Davis,* 2012 WL 7801700, at *6; *Hunter,* 2012 WL 7004154, at *5; *Reviello v. Philadelphia Federal Credit Union,* 2012 WL 2196320, at *4 (E.D. Pa. June 14, 2012)). The alleged inaccessibility Plaintiff complains of is related to Defendant's website not Defendant's physical location. Nonetheless, Plaintiff must demonstrate future harm by showing intent to actually seek Defendant's services.

Under the first factor, Plaintiff lives over 60 miles from Defendant's practice, and thus falls outside the 50–mile limit some courts have applied as the requisite proximity of the challenged place of noncompliant public accommodation to the plaintiff's residency. *Id.* Under the second factor, Defendant argues and Plaintiff does not contest, that Plaintiff has not sought Defendant's services in the past. Thus, Plaintiff fails to meet the second factor. Under the third factor, the Court examines whether Plaintiff has a definitive plan to return, or in this case to seek Defendant's services for the first time. Plaintiff has not indicated that he intends to seek Defendant's services and thus fails to meet the third factor. The fourth and final factor is the frequency of Plaintiff's nearby travel. Plaintiff has not indicated he frequently visits San Antonio or that he travels near Defendant's clinic often. Plaintiff has failed to meet all the elements of the proximity test.

Plaintiff does not agree with the "intent to return" theory discussed *supra,* and contends that under the Fifth Circuit's rationale in *Frame* a person has standing if they "allege the inability to access, the goods, facilities, and services that the Defendant offers." Docket no. 6 p. 16. *Frame v. City of Arlington*, 657 F.3d 215, 221 (5th Cir. 2011). Plaintiff thus argues standing is established under the "deterrent effect" doctrine, where an individual is deterred from visiting the non-compliant location due to the barriers related to his disability. However, as the analysis in *Betancourt* illustrates, even when ADA Title III standing is viewed in a broader sense, standing exists "so long as the alleged discriminatory barriers remain in place, the plaintiff remains disabled, and the plaintiff is 'able and ready' to visit the facility once it is made compliant." *Betancourt,* 735 F.Supp.2d at 604. "Importantly, even under this broader view, to have standing the plaintiff "must at least prove knowledge of the barriers and that they would like to visit the building in the imminent future but for those barriers." *Id* (citing *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000)). Thus, under either theory, a plaintiff must demonstrate an intent to visit the defendant's business in the future. *Deutsch v. Yu*, No. A-16-CV-72 RP, 2016 WL 5317370, at *3 (W.D. Tex. Sept. 21, 2016).

Under the "intent to return" proximity standard, and the "deterrent effect" doctrine Plaintiff has failed to establish standing because he has shown no plan to return to Defendant's website or to seek Defendant's services. Importantly, lack of Article III standing is a defect in subject matter jurisdiction. See *Bender v. Williamsport Area School District,* 475 U.S. 534, 541-42, 106 S. Ct. 1326 (1986); *O'Shea v. Littleton,* 414 U.S. 488, 493-95, 94 S. Ct. 669 (1974). Therefore, when a plaintiff lacks standing to sue in federal court, it is appropriate for the court to dismiss the action, pursuant to Rule 12(b)(1), for want of subject matter jurisdiction. *Access 4 All, Inc. v. Wintergreen Commercial P'ship, Ltd.*, No. CIV.A.3:05-CV-1307-G, 2005 WL 2989307, at *2 (N.D. Tex. Nov. 7, 2005) (citing to *Chair King, Inc. v. Houston Cellular Corporation,* 131 F.3d 507, 509 (5th Cir.1997); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331 (1986)).

IV. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss (docket no. 5) is GRANTED. It is SO ORDERED,

SIGNED this 13 day of February, 2017.

HON. ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE